

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

LEAGUE OF WOMEN VOTERS
OF MICHIGAN, et al.,

Plaintiffs,

V.

RUTH JOHNSON, in her official
capacity as Michigan Secretary of State

Defendant.

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Civil Action No. 17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

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**CONGRESSIONAL INTERVENORS' COMBINED RESPONSE TO
SECRETARY OF STATE RUTH JOHNSON'S MOTIONS *IN LIMINE***

For their response to the Motions *in Limine* to Exclude by Secretary of State Ruth Johnson (ECF Nos. 147 & 148), Congressional Intervenors state that they concur with both Motions.

Given the potential uncertainty regarding the Secretary-elect's position in this litigation, Congressional Intervenors adopt the current Secretary's Motions *in Limine* to Exclude as their own. Furthermore, in the event the Secretary-elect pursues the withdrawal of these Motions, Congressional Intervenors will oppose any such motion to withdrawal.

Dated: December 14, 2018

Respectfully submitted,
Holtzman Vogel Josefiak
Torchinsky PLLC

/s/ Jason Torchinsky
Jason Torchinsky
Attorney for
Congressional Intervenors

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**CONGRESSIONAL INTERVENORS' BRIEF IN SUPPORT OF THEIR
JOINT RESPONSE TO SECRETARY OF STATE'S MOTIONS *IN LIMINE***

CONCISE STATEMENT OF ISSUES PRESENTED

- I. Plaintiffs' proposed expert, Dr. Chen, claimed that he created software directing a computer to draft "neutral" redistricting plans—i.e., plans drawn without partisan consideration. Dr. Chen deleted the instructions to his computer, preventing the Congressmen from verifying that his instructions truly were "neutral." Under *Daubert*, should Dr. Chen's report and simulated redistricting plans be excluded?
- II. Plaintiffs' proposed expert, Dr. Chen, admitted in his report and at deposition that he did not, in instructing his computer to draw simulated plans, follow certain elements of Michigan's traditional redistricting criteria as codified. He failed to control for the effects of these differences in criteria on his simulated redistricting plans and admitted at deposition that he did not consider whether they could provide an alternative explanation for differences between Michigan's Current Apportionment Plan and Dr. Chen's simulations. Because Dr. Chen's simulation instructions were miscalibrated and drew maps using different criteria than established under Michigan law, should his report and simulated plans be excluded under *Daubert*?
- III. Plaintiffs' proposed experts have served reports that include gerrymandering analysis under five different social science metrics. At

deposition, these experts conceded that there is no consensus on which metrics are appropriate to show gerrymandering, or what results under those metrics indicate when gerrymandering is or should be considered unacceptable. Should the Court exclude testimony on those tests under Fed. R. Evid. 702?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules

Fed. R. Evid. 702

Cases

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

Henricksen v. ConocoPhillips Co., 605 F. Supp.2d 1142 (E.D. Wash. 2009)

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A., 209 F. Supp. 3d 612 (S.D.N.Y. 2016)

Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001)

BRIEF IN SUPPORT

Congressional Intervenors concur with the Secretary of State's Motions *in Limine* to Exclude (ECF Nos. 147 & 148). Accordingly, Congressional Intervenors' join Secretary Ruth Johnson in requesting "an order precluding the use at trial . . . the Expert Report of Dr. Jowei Chen [and his] simulated redistricting plans" *See* (ECF No. 147) (Page ID# 5358). Congressional Intervenors also join the Secretary in requesting that the various social science metrics employed by Plaintiffs' experts be excluded under Fed. R. Evid. 702 as they are unreliable and have not gained acceptance within the academic community. *See* (ECF No. 148) (Page ID# 5503-5504).

Furthermore, given the uncertainty inherent in the forthcoming change of the Michigan Secretary of State on January 1, 2019, Congressional Intervenors hereby adopt and incorporate by reference all of the current arguments found within the Secretary of State's Motions *in Limine* to Exclude, (ECF Nos. 147 & 148), as the Congressmen's own. Should the Secretary-elect withdraw these Motions *in Limine* to Exclude, Congressional Intervenors will both oppose the Secretary-elect's withdraw and will defend the substance of the Motions *in Limine* to Exclude.

Dated: December 14, 2018

Respectfully Submitted,

**HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC**

/s/ Jason Torchinsky

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Certificate Of Service

I hereby certify that on December 14, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

**HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY, PLLC**

/s/ Jason Torchinsky
Jason Torchinsky